Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

OMAR RODRIGUEZ, STEVE KARAGIOSIAN AND CINDY GUILLEN-GOMEZ,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

RESPONDENT'S BRIEF

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CITY OF BURBANK, including the
POLICE DEPARTMENT OF THE CITY OF BURBANK
(erroneously sued as an independent entity named
"BURBANK POLICE DEPARTMENT")

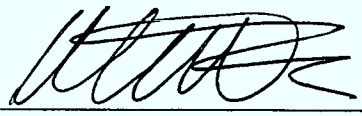
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208.)

Court of Appeal
State of California
Second Appellate District

Trial Court Case Number BC 414602.

Case Name: *Rodriguez, et al. v. Burbank Police Department, et al.*

Defendant and Respondent City of Burbank has no parent corporations and there are no companies owning a 10% or more interest in it. Respondent knows of no entity or person that must be listed under Rule 8.208 subdivisions (1) or (2).



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I. INTRODUCTION

This Appeal arises out of an action for employment discrimination brought by five officers of the Burbank Police Department ("Burbank PD") against their employer, the City of Burbank ("Burbank" or "Respondent"). At the outset of this litigation Plaintiffs produced a document through discovery. They produced it not once, but twice – in two separate document productions. The document was written by Appellant Omar Rodriguez (not to be confused with his co-plaintiff, Elfego Rodriguez, whose appeal from the summary judgment entered against him is to be heard concurrently with this appeal). There was nothing about the document that suggested it was privileged. It was not marked as privileged. It was not addressed to an attorney. It was simply a statement of the facts according to Rodriguez. Defense counsel did what any attorney would do – reviewed the documents produced by Appellants including Rodriguez's statement.

At the first deposition taken in the case, on August 3, 2009, Appellants' counsel Solomon Gresen asserted that the document "might well be privileged" and "may have been inadvertently disclosed." The parties agreed to meet and confer about the issue, and submit it to the Court for resolution if necessary. Meanwhile, defense counsel agreed that they would not use or distribute the document.

After an initial meet and confer failed to resolve the issue, months went by and Appellants took no action to seek return of the document. Finally, defense counsel insisted that the issue be submitted to the Discovery Referee (who had been appointed by the Trial Court) – Judge Diane Wayne. Appellants then made a motion for the return of the document. Burbank opposed that motion on the grounds that the document was not privileged, and that if any privilege existed it had been waived.

Ultimately, the Discovery Referee ruled that the document should be returned.

In June 2010, after almost a year of vigorous litigation and extensive discovery, and shortly after the Court had granted summary judgment as to the claims of the second of the five Appellants, Mr. Gresen suddenly announced his intention to seek disqualification of all defense counsel in this action.[1] The sin of defense counsel, according to Mr. Gresen, is that they read the document which Mr. Gresen himself had repeatedly produced through discovery; and that defense counsel "used" the document by submitting it to the discovery referee for *in camera* review and by arguing that it was not privileged in opposition to Plaintiffs' motion seeking its return.

In this Brief, we will demonstrate that defense counsel did nothing wrong, and that the Trial Court correctly ruled that there were no grounds for disqualification. The defense has gained no unfair advantage from having seen the document, and Appellants come nowhere near to meeting their burden of showing "a substantial continuing effect on future judicial proceedings," which is a prerequisite to the drastic remedy of disqualification. In fact, Appellants' motion was nothing more than a tactical ploy – a desperate move by Appellants to delay and disrupt Burbank's defense once it became apparent to Appellants that their claims would not survive summary judgment.

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1 In their Opening Brief, Appellants assert "Respondent is also represented in this action by Burke Williams & Sorensen LLP." That is untrue. The firm made a temporary appearance in the action for the limited purpose of taking a single deposition. RA 8-9.

II. STANDARD OF REVIEW

Respondent agrees with Appellants' Opening Brief, at 12, that the standard of review is abuse of discretion, and that this Court must "accept as correct all express or implied findings that are supported by substantial evidence." *Apple Computer, Inc. v. Superior Court,* 126 Cal. App. 4th 1253, 1263 (2005). Respondent wishes to note that Appellants' assertion that "where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law," OB at 12, is inapposite, since Appellants are challenging the factual findings of the Trial Court.

III. FACTUAL BACKGROUND

In June 2009, shortly after this litigation was filed, Respondent Burbank noticed the depositions of each of the five Appellants, and served each of them with requests to produce documents. In response to these document requests, Appellants produced a 44 page, single-spaced typewritten document (the Disputed Document), prepared by Appellant Omar Rodriguez,[2] recounting a self-serving version of facts relating to his claims in this lawsuit. Appellants produced this document not once, but on two separate occasions – first Appellant Cindy Guillen produced the document; then Omar Rodriguez produced it again the following day.[3]

Nothing in the document identified it as being an attorney-client privileged document. It was not marked as confidential or privileged. It was not addressed to an attorney, or to anyone for that matter. There was not a single word in the entire 44 pages which in any way suggested that it

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2 The document began by stating "I (Omar Rodriguez)..." *See* 3 AA 583:13-14 [Michaels Decl. ¶ 12].

3 3 AA 583:10-17 [Michaels Decl. ¶ 12].

was a client writing to his attorney – no discussion of potential litigation strategy; no questions about legal issues; no reference to this lawsuit. It referred to Mr. Gresen not as the recipient of the document, but rather in the third person ("my civil attorney"). The tone of the document was not at all the type of conversational tone one would employ in addressing one's attorney. Rather, it was the formal tone of a declaration intended to be used in evidence, starting with the phrase: "I (Omar Rodriguez)..."[4]

This Disputed Document made reference to 33 exhibits. These exhibits were also produced by Appellants, along with the Disputed Document. These exhibits included numerous documents which were the property of the Burbank PD and which Rodriguez ***could not*** have obtained lawfully.[5] Many of them were confidential police personnel records of other Burbank police officers, which are protected against disclosure under California law by California Penal Code § 832.7 (providing that peace officer personnel records are privileged and confidential).[6] Burbank immediately sought a temporary restraining order requiring the return of these police personnel records, which had apparently been stolen by

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4 3 AA 583:18-27 [Michaels Decl. ¶ 13].

5 3 AA 580:10-21 [Savitt Decl. ¶ 8]. At the time of the document production, Rodriguez was on administrative leave from the Burbank PD pending investigation of his alleged misconduct, *see* 1 AA 15:5-6, and therefore would no longer have any access to the exhibits as part of his police duties.

6 *Id. See* Penal Code § 832.7 ("peace officer ... personnel records ... are confidential and shall not be disclosed in any criminal or civil proceeding, except by discovery pursuant to Section 1043 and 1046 of the Evidence Code"). This information is protected against disclosure unless a stringent procedure is followed under Evidence Code §§ 1043 and 1045. *See City of Santa Cruz v. Superior Court*, 190 Cal. App. 3d 1669 (1987). Moreover, this information is protected even if it could be obtained from another source. *See Hackett v. Superior Court*, 13 Cal. App. 4th 96, 100

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Rodriguez. That TRO was granted.[7] Burbank then filed a cross-claim against Rodriguez for conversion of these documents.[8]

Although Burbank and defense counsel were greatly concerned with the apparent theft of confidential police personnel records, defense counsel had no reason to believe that the Disputed Document would later become the subject of a claim of privilege. As would any attorney, defense counsel reviewed the document along with the rest of Appellants' document production, in preparation for Appellants' depositions.[9] However, at the first deposition taken, on August 3, 2009, Mr. Gresen asserted that the document "might well be privileged" and might have been inadvertently produced.[10] All counsel then agreed to meet and confer over the issue, and agreed that if it could not be resolved Mr. Gresen would submit the issue to the Court for resolution. In the meanwhile, defense counsel agreed not to use or disclose the document.[11]

In the meet and confer process, Burbank challenged Appellants' assertion of privilege, and argued that the privilege, if any, had been waived by (among other things) the fact that Rodriguez testified that he had used the document to refresh his recollection in order to testify at his

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(...continued)
(1993); *see also, City of San Diego v. Superior Court*, 136 Cal. App. 3d 236, 239 (1981).

7 3 AA 580:10-21 [Savitt Decl. ¶ 8].

8 *See* 1 AA 198-205 [Cross-Complaint].

9 2 AA 584:1-3 [Michaels Decl. ¶ 14].

10 *See* 3 AA 421:13-19; 3 AA 397:23-24. A few days later, on August 12, 2009, Mr. Gresen sent a letter to defense counsel definitively asserting that the Disputed Document was attorney-client privileged. 3 AA 588 [Michaels Decl., Exhibit A thereto]. Defense counsel promptly responded with a letter explaining why Burbank believed the document was not privileged. 3 AA 590-595 [Michaels Decl., Exhibit B thereto].

11 *Id.*

deposition.[12] In accordance with their agreement not to disclose or use the document until the privilege issue could be resolved, defense counsel did not mark the document as an exhibit at the Appellants' depositions, did not question any of the Appellants about the substance of the document, and did not turn the document over to any third parties (even though the document would have been evidence in ongoing criminal and administrative investigations into the conduct of Omar Rodriguez).[13]

Several months went by, and Mr. Gresen took no action to resolve his claim of privilege or to seek the return of this document.[14] Finally, on December 10, 2009, defense counsel wrote Mr. Gresen to demand that he take action to resolve the issue.[15] On January 8, 2010, briefs on the issue were submitted to the Discovery Referee – Hon. Diane Wayne.[16] Judge Wayne reviewed the document in camera, and eventually recommended granting Appellants' motion to compel return of the Disputed Document.[17] The Court adopted that recommendation on March 15, 2010.[18] However, Appellants did not serve the Court's order until April 6, 2010.[19]

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12 3 AA 584:11-13, 19-24; 585:1-5; 590-595; 601-610. [Michaels Decl. ¶¶ 16, 18, 20 and Exhibits B and D thereto].

13 *Id.*

14 3 AA 584:25-28 [Michaels Decl. ¶ 19]. At one point, in advance of a meeting with the Discovery Referee on October 14, 2009, Mr. Gresen did mention the issue in a letter to the Discovery Referee. *See* OB at 7. At the meeting, Judge Wayne advised Mr. Gresen that if he wanted the issue to be heard he would have to bring a noticed motion. This fact was confirmed in an e-mail from defense counsel to Mr. Gresen. 3 AA 597 at ¶ 3.

15 3 AA 584:25-28, 597-599 [Michaels Decl. ¶ 19 and Exhibit C thereto].

16 3 AA 465-474 [Plaintiffs' Brief]; 3 AA 475-486 [Burbank's Brief].

17 3 AA 585:6-8 [Michaels Decl. ¶ 21].

18 *Id.*

19 *Id.*

Throughout this time, and in the months following, both sides vigorously litigated this action. Burbank took the depositions of all five Appellants. Appellants took numerous depositions. There were discovery motions. Burbank moved for summary judgment as to the claims of four of the five Appellants. Two of those motions were granted by the Trial Court during this period. Appellants then took appeals from those rulings. Throughout this entire process, lasting almost a year, Appellants never gave any indication that they intended to seek to disqualify defense counsel.[20]

On May 21, 2010, the Court granted the second of Burbank's summary judgment motions.[21] Shortly after that, on June 11, 2010, Appellants first announced their intention to seek to disqualify defense counsel – on the grounds that defense counsel had read and "used" the Disputed Document. This announcement came in connection with an *ex parte* application to the Trial Court, by which Appellants sought to continue the hearing on the summary judgment motion scheduled for hearing.[22] The following Tuesday, June 15, 2010, defense counsel received Appellants' motion to disqualify all defense counsel.[23]

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20 3 AA 585:20-28 [Michaels Decl. ¶ 24].

21 *Id.*

22 3 AA 585:9-13; 612-626. [Michaels Decl. ¶ 22, and Exhibit E thereto]. The Court granted a continuance of the summary judgment hearing from June 30, 2010 to August 13, 2010, specifically noting that the continuance was based ***solely*** on the burden of responding to the motion, and not on any other grounds asserted in the *ex parte* application (implicitly rejecting Plaintiffs' announced intention to file a motion to disqualify as a reason to continue the summary judgment hearing). 3 AA 585:13-17; 628-630 [Michaels Decl. ¶ 22 and Exhibit F thereto].

23 Plaintiffs subsequently filed another motion to disqualify the Burbank City Attorneys Office. *See* OB at 10. That companion motion was based on Plaintiffs' unilaterally announced intention to call two City Attorneys as witnesses. Like the motion from which this appeal is taken, that companion motion was based on events which had occurred many

(...continued)

The Trial Court directed Appellants to lodge the Disputed Document for in camera review.[24] Based on that review, the Trial Court ruled that the document was not obviously privileged, and that defense counsel had done nothing wrong by challenging Appellants' unilateral assertion that the document was privileged.[25]

During the hearing on that motion, Appellants offered an entirely new theory as to why the document was privileged. Appellants noted that there was a reference to Rodriguez meeting with his attorney contained in the document.[26] Because Appellants had never raised this assertion before, and because defense counsel no longer had access to the Disputed Document (having already returned it), defense counsel could not address this issue in complete detail. However, the defense counsel at oral argument advised the Trial Court that he had not noticed such a reference in the document until after Appellants had raised their claim of privilege, that upon further review of the document in connection with evaluating the claim of privilege defense counsel had noticed a passing reference to a meeting between Rodriguez and his attorney buried near the back of the document (around page 40), but that nothing had been discussed about what had been said at the meeting.[27]

(...continued)
months previously. Although Plaintiffs have not appealed the Trial Court's denial of the companion motion, *id.*, the filing of that motion many months after the facts on which it was based, but immediately after the Trial Court's granting of the second summary judgment motion, is further evidence that Plaintiffs brought their disqualification motions for purely tactical reasons.

24 3 AA 661.

25 4 AA 694-696 [October 28, 2010 Order].

26 3 AA 675:21-677:6.

27 3 AA 682:28-683:19.

Appellants filed a Petition for a Writ of Mandate with this Court, which was denied. Appellants then filed this appeal.[28] On June 16, 2011, while this appeal was pending, the Trial Court entered an order granting summary judgment as to Rodriguez's claims against Burbank. RA 20-30 [June 16, 2011 Order].

IV. ARGUMENT

A. Defense Counsel Did Not Engage In Any Improper Conduct.

Appellants' appeal is based on two arguments: First, Appellants argue that defense counsel should have recognized that the Disputed Document was privileged as soon as they saw it, and returned it immediately, or immediately upon being advised of Appellants' assertion that it was privileged. Second, Appellants argue that defense counsel subsequently "used" the document. Both arguments are utterly without merit.

1. Defense Counsel Had No Reason To Believe That The Disputed Document Was Privileged.

Contrary to Appellants' assertion that the Disputed Document was self-evidently privileged, there is no way that defense counsel could possibly have recognized it as an attorney-client communication, or anticipated that Appellants would assert that it was privileged. Appellants had produced this document (not once, but twice) through discovery.[29] There was nothing about the Disputed Document that in any way suggested that it was privileged. It was not marked as confidential or privileged. It

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28 4 AA 699-700 [Notice of Appeal].

29 3 AA 583:10-17.

was not addressed to an attorney (or to anyone). It was not dated. It did not include anything that a client, writing to his attorney, would include – there was no discussion of potential litigation strategy; no questions about legal issues; no reference to the lawsuit. It referred to Mr. Gresen not as the recipient of the document, but rather in the third person ("my civil attorney"). The tone of the document was not at all the type of conversational tone one would employ in addressing his attorney. Rather, it was the formal tone of a declaration intended to be used in evidence, starting with the phrase: "I (Omar Rodriguez)..."[30]

Appellants' assertion that defense counsel somehow knew that the document was privileged, and read it anyway, is completely unsupported and self-serving. Defense counsel wish to assure this Court in the strongest possible terms: ***Defense counsel did not believe (and to this day do not believe) that this document was privileged.*** Defense counsel respect Judge Wayne's ruling on this point, and obeyed that ruling, but even in light of that ruling defense counsel firmly believe that Appellants' assertion that Rodriguez prepared this document for his attorney is flatly untrue.[31] As defense counsel advised the Trial Court, they have seen dozens of similar self-serving statements, written by other disgruntled employees, produced

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30 3 AA 583:18-27.

31 If, as Defendants believe, Omar Rodriguez prepared this document for any of the purposes listed above, the document would not have been privileged. "Documents prepared independently by a party [...] do not become privileged communications or work product merely because they are turned over to counsel. The person claiming the attorney-client privilege must establish that the evidence sought to be protected falls within the statutory terms." *Green & Shinee v. Superior Court*, 88 Cal. App. 4th 532, 536-537 (2001) (internal citations and quotations omitted). Accordingly, Burbank argued that the Document was not privileged, and asserted Rodriguez could not convert the otherwise unprivileged document

(...continued)

through discovery.[32] Often, such statements are written for use in anticipated administrative proceedings, or to submit to the California Department of Fair Employment and Housing or some other government agency. Often they are prepared for the employee's own use – to jog his memory or assuage his psyche.[33] Often they are prepared in the belief that they will be useful as evidence in potential litigation.[34] The preparation of such a document by a police officer, such as Rodriguez, is especially unremarkable since police officers routinely prepare detailed factual reports for subsequent use as evidence in judicial proceedings.

Plaintiffs' argument as to why defense counsel supposedly should have recognized the document as privileged is that: (1) it was written in the first person; (2) it had the header "Hostile Work Environment and Discrimination Historical;" (3) it defined acronyms; and (4) it had exhibits attached. OB at 15. Not one of these characteristics even vaguely suggests that the document was written for an attorney. Countless non-privileged documents have these characteristics. In fact, these characteristics suggest the exact opposite of a letter to an attorney. They suggest that the document was written in the form of a declaration to be submitted to a court or administrative agency, rather than for Mr. Gresen, who would already know that the document was prepared by Omar Rodriguez, and would already know that it was about allegations of harassment and discrimination.

(...continued)
into a privileged one simply by giving it to his attorney. 3 AA 601-610 [Burbank's Letter Brief at pp. 2-3 and authorities cited therein].

32 3 AA 586:1-8 [Michaels Decl. ¶ 25].

33 *Id.*

34 We readily acknowledge that employers also prepare documentation of events for potential use as evidence in litigation. There is nothing unusual about the practice on either side.

In contrast, in the case relied on by Appellants, *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007), the privileged document at issue consisted of notes of a meeting between the defense attorney, his client, and his experts, which set out the defense's litigation strategy. The document in that case was ***obviously*** attorney work product, and the plaintiff's attorney admitted that he knew what the document was immediately upon reviewing it. *Id.* at 819-820. Similarly, in *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 (1999), the inadvertently produced documents were clearly marked as privileged and confidential: "The heading at the top of each claim summary form reads: 'ATTORNEY-CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT,' followed by: 'DO NOT CIRCULATE OR DUPLICATE,'...The word 'CONFIDENTIAL' is repeatedly printed around the perimeter of the first page of the form." *Id.* at 648.

In short, Appellants' argument that defense counsel believed, then or now, that the Disputed Document was privileged, is utter nonsense. There is no plausible argument that defense counsel should be disqualified for failing to anticipate Appellants' claim of privilege.

Appellants' alternative argument, presented for the first time at the hearing on the motion to disqualify in the Trial Court, is equally meritless. Appellants argue that the document was privileged because there was some passing reference to Rodriguez having met with his attorney, buried somewhere near the back of the 44 page single-spaced document. Respondent is handicapped in responding to this argument, since we do not have access to the document. However, as defense counsel advised the Trial Court at the hearing, we recall one brief reference to a meeting between Rodriguez and his attorney, which we noticed only upon re-reviewing the document after Appellants had asserted their claim of

privilege, and which did not disclose the contents of any attorney-client communication.[35]

Appellants argument that the document was privileged based on this passing reference to a meeting is not properly before this Court, because it was not the basis on which Appellants asserted privilege in the court below. Appellants never advanced this theory in the meet and confer, never presented it to Judge Wayne in their motion to compel return of the document, and did not even address it in their briefs in connection with the motion to disqualify defense counsel.

If Appellants had ever mentioned the supposedly offending sentence when they asserted their claim of privilege in the court below, the issue could easily have been resolved by redacting the sentence in question. The fact that Rodriguez met with his attorney (aside from being self-evident, since every client meets with his attorney), was of no interest to Respondent and could have no possible impact on the litigation. As discussed below, disqualification of counsel is permissible only where it is necessary to prevent "a substantial continuing effect on future judicial proceedings." *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 309 (1989). The passing reference to a meeting between Respondent and his attorney could not have had any possible effect, much less a "substantial continuing effect," on the litigation below.

It should also be noted that the reference to a meeting between Rodriguez and Mr. Gresen further contradicts Appellants' core contention

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35 *See* 3 AA 682:28-683:19. In their Opening Brief at 16, Appellants assert that there were four such references. If this is true, defense counsel did not notice them. Our memory of the document is that the very brief reference to a meeting between Rodriguez and his attorney was simply noted as the occasion on which Rodriguez had obtained one of the unprivileged exhibits attached to the document.

that the Disputed Document was written by Rodriguez for Mr. Gresen. There would have been no possible reason for Rodriguez to prepare a document for his attorney in order to advise the attorney that they had previously had a meeting. Thus, if defense counsel had noticed this reference on first reading the document, it would have been further reason to conclude that the document was ***not*** privileged, but rather had been written for some outside party, such as the California Department of Fair Employment and Housing.

2. Defense Counsel Had A Good-Faith Basis To Contest Appellants' Claim Of Privilege.

Even if there had been some hint from which defense counsel could have anticipated Appellants' claim of privilege (and there was ***none***), defense counsel still would have had the right to contest that claim before the Discovery Referee. Nor was Burbank required to return the Disputed Document immediately upon Mr. Gresen's after-the-fact assertion that the Disputed Document was privileged. Burbank had several legitimate grounds to contest Appellants' claim that the document was privileged, and/or to assert that any privilege had been waived.

First, as discussed above, the Disputed Document gave no indication of being privileged. The only basis for the claim of privilege is Appellants' after-the-fact declaration that Mr. Gresen asked Rodriguez to prepare the document.[36] As the Trial Court correctly noted in is ruling below, "As of August 3, 2009 and August 12, 2009 plaintiffs' claim of privilege was simply attorney argument which defendant's counsel vigorously disputed."

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36 3 AA 412:9-13 [quoting deposition of Omar Rodriguez].

Second, at his deposition Rodriguez testified that he reviewed the Disputed Document to refresh his recollection in preparation for his testimony. Rodriguez testified:

> "Q: You prepared a 40-page — a 44-page memorandum and chronology of events. Have you reviewed that in preparation of your deposition?
>
> A: I've read it probably about a week to two weeks ago.
>
> Q: By Ms. Savitt: And that was to help you refresh your recollection in preparation for your deposition?
>
> A: Yes."[37]

From this Burbank believed, and argued to the Discovery Referee below, that Rodriguez had waived any privilege with respect to the document. Evidence Code § 771 provides, in relevant part: "[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party ... ." *See also International Ins. Co. v. Montrose Chemical Corp. of Calif.*, 231 Cal. App. 3d 1367, 1372-1373 (1991) (a party cannot properly refuse to produce documents used by the deponent to refresh his recollection in preparation for the deposition).

In *Kerns Construction Co. v. Superior Court*, 266 Cal. App. 2d 405, 410 (1968), the witness reviewed a privileged document for the purpose of giving testimony, the privilege was thereby lost.

> "[I]t would be unconscionable to prevent the adverse party from seeing and obtaining copies of them. We conclude there was a waiver of any privilege which may have existed."

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37 3 AA 603-604.

See also People v. Smith, 40 Cal. 4th 483, 509 (2007) (Supreme Court upheld production of psychologist's privileged notes and test data under Evidence Code Section 771).

In short, Burbank's argument that Rodriguez had waived any privilege as to the Disputed Document was well-supported in California law.[38] Although Judge Wayne rejected Burbank's argument, relying on *Sullivan v. Superior Court*, 29 Cal. App. 3d 64 (1972), Burbank's argument was perfectly legitimate, defensible, and asserted in good faith.

Third, Rodriguez took no action to enforce the claimed privilege until many months after the document had been produced to Burbank. Rodriguez finally took action ***only*** when defense counsel demanded that he do so. Undue delay in seeking to enforce a claimed privilege waives the privilege. In *United States v. De La Jara*, 973 F.2d 746, 750 (9th Cir. 1992), the Court held that a six month delay in attempting to retrieve allegedly privileged documents waived any privilege. The Court of Appeal in *Regents of University of California v. Superior Court*, 165 Cal. App. 4th 672, 681-82 (2008), cited *De La Jara* with approval, quoting that case for the following proposition:

> "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered. We have previously held that the attorney-client privilege may be waived by implication, even when the disclosure of the privileged material was 'inadvertent' or involuntary. When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. ***Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter.*** (Emphasis added, Citations omitted.)

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38 *See* 3 AA 601-610 [Burbank's Letter Brief at pp. 2-5 and authorities cited therein].

> De la Jara did nothing to recover the letter or protect its confidentiality during the six month interlude between its seizure and introduction into evidence. By immediately attempting to recover the letter, appellant could have minimized the damage caused by the breach of confidentiality. As a result of his failure to act, however, he allowed 'the mantle of confidentiality which once protected the document[ ]' to be 'irretrievably breached,' thereby waiving his privilege."

Even if the Disputed Document had been privileged in the first instance, Burbank asserted that Rodriguez's lengthy delay in taking any action to address the issue with the Court or the Discovery Referee constituted a waiver of any privilege.[39] Again, Burbank's position was perfectly legitimate, and Burbank had every right to present this argument to the Discovery Referee.

In short, Burbank had legitimate, good faith arguments that the Disputed Document was not privileged, or that any privilege which might have existed had been waived. Although Judge Wayne did not agree with those arguments, there can be no possible contention that Burbank was not entitled to seek a hearing on these issues, rather than immediately acceding to Appellants' position and agreeing that the document was privileged. Defense counsel cannot be disqualified for presenting the issue, in good faith, to Judge Wayne for resolution.

3. Defense Counsel Did Not "Use" The Disputed Document.

Contrary to Appellants' argument, Burbank has never used or disclosed the Disputed Document. It was not offered as evidence. It was not marked as an exhibit. Appellants were never asked any questions about

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39 *See Id.*

the contents of the document in discovery. It was not provided to the federal and local authorities that were conducting investigations into the conduct of Rodriguez.

Appellants argue that defense counsel "used" the Disputed Document in several ways. As we will demonstrate, these assertions are misleading and disingenuous. The supposed "use" of the document consisted of nothing more than the fact that defense counsel gave the document to Judge Wayne for *in camera* review in connection with the motion to compel return and a related motion heard at the same time, and presented arguments to Judge Wayne that the document was not privileged, that the privilege had been waived, and that it would be proper to use the document. There was nothing improper about such *in camera* review, and it was obviously necessary in order for Judge Wayne to evaluate Appellants' claim of privilege. Nor was there anything improper about the arguments presented by defense counsel as to why the document was not privileged (which are discussed above). Appellants did not object to the *in camera* review, or to defense counsel presenting their arguments, at the time; and, obviously, Judge Wayne saw nothing inappropriate about it.

In their Opening Brief, Appellants asserts there were eight ways (misnumbered as nine ways) in which defense counsel supposedly used the Disputed Document. OB at 27. Not a single one of these assertions has the least merit.

a. Defense counsel did not "use" the Disputed Document by failing to recognize as privileged immediately.

The first three supposed "uses" on Appellants' list are that defense counsel: "(1) failed to notify Appellants of their receipt of the Privileged Document, (2) copied the Privileged Document, (3) read the entire

Privileged Document." OB at 27. These three assertions simply restate Appellants' contention that defense counsel should have recognized the document as privileged and returned it immediately. As established above, and as correctly found by the Trial Court, defense counsel could not possibly have recognized that the document would become the subject of a later claim of privilege.

b. Defense counsel did not "use" the Disputed Document at deposition.

Appellants' fourth assertion is that "(4) defense counsel used the Privileged Document at deposition." OB at 27. Although Appellants do not say what they are talking about or cite anything in the record to support this assertion, it would appear that they are referring to the fact that defense counsel had the document sitting on the table in front of him at the deposition of Appellant Guillen, when Mr. Gresen suddenly announced:

> "MR. GRESEN: Before — before we start, the document that I see you have, peering over your shoulder, I would like to have a look at it before you used it because when you said a 45-page document by Omar Rodriguez, that might well be a confidential attorney/client document that was prepared for me that may have been inadvertently disclosed to you."[40]

Leaving aside the questionable propriety of Mr. Gresen "peering over [the] shoulder" of opposing counsel to see what documents were there, the mere fact that defense counsel had the document in his possession at the deposition did not in any way constitute "use" of the document. When Mr. Gresen made his equivocal assertion that the Disputed Document "might well be privileged," defense counsel immediately met and conferred with

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40 3 AA 421:13-19.

Mr. Gresen, and agreed not to use the document until Mr. Gresen had an opportunity to present his contention to the Court.

c. Defense counsel did not file a cross-complaint "based on" the Disputed Document.

Appellants' next assertion is that defense counsel "(6) filed a cross-complaint based on the Privileged Document." OB at 27. Again, this is flatly false. Burbank filed its cross-complaint against Rodriguez for conversion of Burbank's confidential police personnel records based on Rodriguez's production of ***those records themselves*** – not on the Disputed Document or anything contained therein. Burbank contends that Rodriguez used his position as a Lieutenant at the Burbank PD to steal these personnel records.[41] Burbank knows about the stolen documents because Rodriguez produced them – not because they happen to be mentioned in the Disputed Document. While it is true that the Disputed Document makes reference to many of these stolen personnel records as exhibits thereto, ***the stolen documents themselves*** have never been the subject of any claim of privilege, nor could they be since they were Burbank's documents in the first place. Burbank's cross-complaint relied expressly on the fact that stolen documents were produced by Rodriguez, and made no reference at all to the Disputed Document. The relevant allegation in the cross-complaint is Paragraph 8, which stated:

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41 It is ironic indeed that the Plaintiffs accuse defense counsel of improper conduct for simply reading a document which Plaintiffs themselves had produced through discovery, while Plaintiff Omar Rodriguez deliberately stole confidential documents from the Burbank Police Department. 3 AA 580:5-581:10. What is more, Plaintiffs forced Burbank to seek and obtain multiple court orders before finally returning the stolen documents. *Id.*

8. Certain documents produced by OMAR RODRIGUEZ on or about July 30, 2009 are confidential police department records (the "PERSONNEL FILE DOCUMENTS"), including internal affairs investigations of non-party members of the Burbank Police Department, exam test results for non-party members of the Burbank Police Department, and employee comment cards.[42]

In short, Appellants' assertion that Burbank's cross-complaint is "based on" the Disputed Document is flatly untrue and patently frivolous.

d. Defense counsel did not rely on the Disputed Document in support of any discovery motion.

Appellants' next assertion is that defense counsel "(7) brought a successful discovery motion which relied on and attached portions of the Privileged Document." OB at 27. The motion in question was Burbank's motion to compel inspection of Rodriguez's laptop computer, which was heard by Judge Wayne at the same time as she heard Rodriguez's motion seeking the return of the Disputed Document.[43] Burbank did mention the Disputed Document in its brief to Judge Wayne – it would have been silly for Burbank to pretend that the Disputed Document did not exist at the very hearing where the Discovery Referee was going to rule on whether the Disputed Document was privileged (after conducting an *in camera* review). Burbank's passing reference to the Disputed Document in its brief regarding the laptop computer was simply for the purpose of pointing out that Rodriguez had already been shown to have stolen certain documents (the Exhibits to the Disputed Document), and might have additional such

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42 1 AA 200:8-11.

43 3 AA 494-539 [Burbank's Motion to Compel Production of Rodriguez's Laptop].

documents on his computer.[44] Again, this was before Judge Wayne had ruled on the claim of privilege, and Appellants made no objection to Judge Wayne considering this mention of the Disputed Document at or before the hearing.

Furthermore, even Appellants themselves have never argued that the mere fact that there were Exhibits attached to the Disputed Document was confidential. Appellants' own briefing to the Trial Court and to this Court makes repeated reference to that fact, and if Appellants had produced a privilege log (as they should have), the fact that non-privileged exhibits were attached to the Disputed Document would have been disclosed therein.

e. Defense counsel did not "continue to use" the Disputed Document in deposition.

Appellants' next assertion is that defense counsel "(8) continued to use the Document at deposition." OB at 27. This time, the supposed "use" of the document was that defense counsel Linda Miller Savitt asked Rodriguez at his deposition, ***in the presence of the Discovery Referee who was presiding over the deposition,*** whether reviewing the Disputed Document would refresh his recollection as to the names of two Burbank police officers. OB at 8-9. This was ***after*** Rodriguez had ***already*** testified that he had used the Disputed Document to refresh his recollection for purposes of giving deposition testimony. As it happens, Judge Wayne sustained Mr. Gresen's objection to that question, and the question was

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44 It was not entirely clear that Rodriguez had returned all of the stolen documents after being ordered to do so by the Trial Court, because the copies of the stolen documents that Rodriguez returned were not marked as Exhibits to the Disputed Document (in other words, there might have been other documents or copies of documents that Rodriguez had not returned).

never answered.[45] The mere fact that the question was raised for Judge Wayne to rule on did not constitute a "use" of the document.

f. Defense counsel did not improperly retain the Disputed Document.

Appellants' final assertion is that defense counsel "(9) retained the Document for at least three months after a Court Order to return all copies to Appellants. (In fact, to the date of the filing of this Petition, the Burbank City Attorney's Office has still not returned its copies of the Privileged document to Appellants.)" OB at 27-28.

Again, Appellants misstate the record. There was a delay (not three months) in returning the Disputed Document to Appellants after the Trial Court adopted Judge Wayne's recommendation that the document be returned. This was in part because Mr. Gresen delayed for weeks before serving the order, and in part because defense counsel Linda Miller Savitt (who was handling this issue for the defense) was in trial at the time the order was served by Mr. Gresen, and did not see the order immediately.[46] Mr. Gresen never bothered to inquire about the return of the document before announcing his intention to make a motion to disqualify, and Appellants do not identify any purported consequences or prejudice resulting from the delay. As soon as defense counsel realized that the document had not yet been returned, they notified Mr. Gresen that they would return it, and did so.[47] (Ironically, the same Referee's Recommendation and the Court's Order thereon required Appellants to produce Rodriguez's laptop computer for inspection, and Mr. Gresen

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45 *See* 3 AA 547:7-550:22.

46 3 AA 586:9-17, 632-634, 636 [Michaels Decl. ¶ 26, and Exhibits G & H thereto]; 3 AA 579:12-580:4 [Miller Savitt Decl. ¶¶ 3-6].

47 *Id.*

delayed in complying with that provision of the Order, which Mr. Gresen explained was also inadvertent.[48] Mr. Gresen did exactly what defense counsel did – delayed compliance with the very same court order; and for exactly the same reason – inadvertence; yet he seeks to disqualify defense counsel based on that delay.)

Appellants' assertion that "to the date of the filing of this Petition, the Burbank City Attorney's Office has still not returned its copies of the Privileged document to Appellants," is flatly untrue and, of course, Appellants cite nothing in the record to support this assertion. In their original motion, which was filed before the documents had been returned, Appellants noted that the document had not been returned.[49] Appellants subsequently filed an amended version of their motion (on August 11, 2010), by which time the Disputed Document ***had been*** returned to Appellants.[50] Yet the amended motion continued to assert that the document had not been returned.[51] That assertion continues to be made in Appellants' Opening Brief. We will give Appellants the benefit of the doubt that this was simply sloppiness by Mr. Gresen as he revised his papers in the Court below into his brief on appeal, rather than a deliberate misrepresentation to this Court.

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48 3 AA 586:18-21, 638 [Michaels Decl. ¶ 27 and Exhibit I thereto].
49 *See* 2 AA 227:11-13.
50 *See* 3 AA 586:9-17 [Michaels Decl. ¶ 26].
51 *See* 3 AA 401:2-5.

B. Even If Defense Counsel Had Done Anything Improper With Respect To The Disputed Document (Which They Emphatically Did Not), Disqualification Would Not Be A Proper Remedy.

1. Disqualification Is Permissible Only Where It Is Necessary To Prevent A Substantial Continuing Effect On Future Judicial Proceedings.

As the Court explained in *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 657 (1999), "***Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification***." (Emphasis added).

> The cases have consistently concluded that mere exposure to confidential information of the opposing party does not require disqualification. (*See Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 , 302-304, 308-315; *Bell v. 20th Century Ins. Co.* (1989) 212 Cal.App.3d 194 , 198; *Maruman Integrated Circuits, Inc. v. Consortium Co.* (1985) 166 Cal.App.3d 443 , 448; *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582 , 592.)

Neal v. Health Net, Inc., 100 Cal. App. 4th 831, 841-42 (2002).

Disqualification is a prophylactic remedy, appropriate only where it is necessary to prevent "***a substantial continuing effect*** on future judicial proceedings." *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 307 (emphasis added).

> Since the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question ***will affect the outcome of the proceedings before the court.*** *Id.* at 308-09 (emphasis added).

Here, there is no possibility that the Disputed Document will have ***any*** continuing effect on this litigation, much less a "substantial continuing effect." In the first place, the Trial Court has already entered summary

judgment against Rodriguez on his Complaint against Burbank. RA 3 [June 16, 2011 Order]. Appellants do not, and could not, contend that the Disputed Document played any role in the summary judgment motion which disposed of Rodriguez's claims.

Even at the time Appellants made their motion to disqualify in the Trial Court, however, the Disputed Document had no potential for having any impact on the litigation. This document was an entirely self-serving account of the facts according to Rodriguez. It is the same account of the facts Rodriguez told in his deposition. Unlike the attorney notes in *Rico*, the Disputed Document did not contain any information as to the litigation strategy of Appellants. It did not contain any mental impressions of counsel. It did not contain any analysis of the strengths or weaknesses of Appellants' case. It is simply Rodriguez, telling his factual story – which is information Burbank was entitled to learn (and did learn) through discovery anyway.

The point is illustrated by *Aerojet-General Corp. v. Transport Indemnity Insurance*, 18 Cal. App. 4th 996 (1993). There, an attorney obtained a privileged memo from the opposing party, which revealed the name of a witness. The attorney attempted to call the witness at trial. The trial court sanctioned the attorney for using the information contained in the memo, and precluded the testimony of the witness. The Court of Appeal reversed, because the identity of the witness could have been obtained through discovery even without the inadvertent disclosure:

> The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure. Further, not all information that passes privately between attorney and client is entitled to remain confidential in the literal sense. The most obvious example is information that is required to be disclosed in response to discovery, such as the identification of potential witnesses. Consequently, whether the existence and identity of a witness or other nonprivileged

> information is revealed through formal discovery or inadvertence, the end result is the same: the opposing party is entitled to the use of that witness or information. *Id.* at 1004.

The *Aerojet* Court went on to note that it did not matter whether the information was actually obtained through other discovery – the mere fact that it was discoverable precluded the imposition of sanctions:

> For example, if respondents either deliberately or negligently failed to disclose the existence of a relevant witness in response to discovery requests, they would hardly be in a position to take advantage of their conduct if that information was subsequently inadvertently disclosed. To go one step further, even if discovery aimed at the disclosure of this information had not been initiated by the plaintiffs, only the actual communication between attorney and client is privileged; the underlying factual information, *e.g.*, the existence of the witness, is not. *Id.* at 1004-05.

In the instant case, Appellants identify nothing about the Disputed Document which would create "a substantial continuing effect" on this action. The contents of the document give defense counsel no advantage, since this is just factual information which defense counsel obtained independently through discovery. The factual information contained in the document was not itself privileged, and Burbank obtained no advantage whatsoever by virtue of seeing the document. The same is true of the fact that the Disputed Document was prepared in the first place. Defense counsel would have learned of the existence of the document no matter what, since Rodriguez testified at deposition that he had used the document to refresh his memory to help him testify. 3 AA 412:9-13. In addition, if Rodriguez had submitted a privilege log, as he should have, the existence of the document would have been disclosed by that privilege log.

2. Appellants' Delay Of Nearly One Year In Seeking Disqualification Demonstrates That Appellants' Motion To Disqualify Was Never Meant To Prevent Burbank From Obtaining An Unfair Advantage From Having Seen The Document, But Rather To Obtain A Tactical Advantage For Appellants.

It is clear that Appellants themselves are well aware that the Disputed Document has no significance to this action, since they waited for many months before seeking its return, and then waited months more before bringing their motion for disqualification. Mr. Gresen became aware, at the very outset of this litigation, that the Disputed Document had been produced to Burbank, and had been read by defense counsel. The issue arose on the first morning of the first deposition taken in this case, on August 3, 2009. Mr. Gresen made no claim of attorney disqualification at that time. In fact, the parties expressly agreed to handle the issue exactly as it was handled – defense counsel agreed not to use the document until Mr. Gresen could make a motion seeking its return.[52]

Over a period of several months, Burbank proceeded to take the depositions of all five Appellants, including Rodriguez. Through that entire time, Appellants never mentioned any contention that defense counsel should be disqualified. At one point, Appellants refused to appear for their depositions based on objections to the ***location*** of the depositions and the ***persons who were present***,[53] but they never mentioned the Disputed Document as a reason why they should not be deposed by the current defense counsel, or made any contention that defense counsel should be disqualified. Certainly if Appellants believed that the Disputed Document

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52 3 AA 421:13-19, 3 AA 584:4-10.

53 3 AA 585:20-28 [Michaels Decl. ¶ 24]. This forced Burbank to move to compel Plaintiffs to appear for deposition, and for the appointment (...continued)

gave Burbank some unfair advantage in this litigation, they would have raised the issue before Rodriguez repeated the same facts in deposition. However, Appellants did not even bother to seek the return of the document until defense counsel ***insisted*** that the issue be submitted to the Discovery Referee for resolution.

Only after Burbank successfully moved for summary judgment as to the claims of two of the Appellants (and had filed its motions for summary judgment as to the claims of two more Appellants) did Appellants raise the issue of disqualification. When they did raise it, it was in the context of an *ex parte* application to continue the hearing on one of the summary judgment motions.[54]

The fact that Appellants continued to litigate this action for almost a year before ever raising a claim of disqualification demonstrates that their motion to the Trial Court was made purely for tactical reasons. The Courts of Appeal have shown considerable hostility to the use of disqualification motions to obtain a tactical advantage in litigation. As the Court stated in *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 300-01 (1989):

> ***[A]s courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent.*** (See *Armstrong v. McAlpin, supra*, 625 F.2d at pp. 437-438.) Such motions can be misused to harass opposing counsel (*Richardson-Merrell, Inc. v. Koller* (1985) 472 U.S. 424, 426, 436 [86 L.Ed.2d 340, 343-344, 350, 105 S.Ct. 2757]), to delay the litigation (*Comden v. Superior Court, supra*, 20 Cal.3d at p. 915), or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable.... ***In short, it is widely understood by judges that "attorneys***

(...continued)
of Judge Wayne as discovery referee. That motion was granted by the Court on October 2, 2009. RA 1-6.

54 3 AA 585:9-17, 612-626 [Michaels Decl. ¶ 22 and Exh. E].

> ***now commonly use disqualification motions for purely strategic purposes*** ...." (Emphasis added, footnote and citation omitted).

See also Comden v. Superior Court, 20 Cal. 3d 906, 915 (1978) ("It would be naïve not to recognize the motion to disqualify opposing counsel is frequently a tactical device to delay litigation."); *Graphic Process Co. v. Superior Court*, 95 Cal. App. 3d 43, 52, fn. 5 (1979) ("'[I]n cases that do not involve past representation [conflict cases] the attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of the tactics of an adversary proceeding.'"); *Maruman Integrated Circuits, Inc. v. Consortium Company*, 166 Cal. App. 3d 443, 450-451 (1985) ("[I]n exercising this discretion [in a disqualification proceeding], the judge may properly consider the possibility that the party brought the disqualification motion as a tactical device to delay litigation.") (citation omitted); *White v. Superior Court*, 98 Cal. App. 3d 51, 55 (1979) (accord).

Here, Appellants' delay in seeking disqualification would have severely prejudiced Burbank if the motion had been granted. Forcing Burbank to change attorneys after most discovery had been completed, and while dispositive motions were pending (as were appeals from the previously granted summary judgment motions), would have been far more disruptive after a year of vigorous litigation than if Appellants had raised the issue at the outset of the litigation. As the *Gregori* Court noted:

> [I]t must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his choice suffers a particularly heavy penalty where, as appears to be the case here, his attorney is highly skilled in the relevant area of the law. 207 Cal. App. 3d at 302.

Failure to make a timely motion to disqualify counsel, and resulting prejudice to the opposing party, waives any right to seek disqualification. *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1313 (1987) ("[w]e find the delay in making the disqualification motion so unreasonable and the resulting prejudice so great, that the law must assume an implied waiver of the right to disqualify").

V. CONCLUSION

Appellants' effort to disqualify defense counsel was and is a transparent ploy to disrupt Burbank's defense of this action. Throughout the proceedings below, defense counsel acted ethically and properly in dealing with a problem which was created solely by Mr. Gresen's repeated production of the Disputed Document through discovery. Mr. Gresen seems to believe that he was entitled to use his own mistake to obtain a tactical advantage when, after nearly a year of litigation, he decided that the case was not going well for his clients. California law does not permit a litigant to "nullify a party's right to representation by chosen counsel ***any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox***." *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th at 657 (emphasis added).

Here, we do not speculate whether Mr. Gresen sent defense counsel the Disputed Document through "inadvertence" or through "devious design," because it does not matter which it was. Either way, the Trial Court properly denied the motion for disqualification, and its ruling must be affirmed.

DATED: September 2, 2011

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Respondents is produced using 13-point Times New Roman type including footnotes and contains approximately 8,816 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: September 2, 2011

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Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

OMAR RODRIGUEZ, STEVE KARAGIOSIAN
AND CINDY GUILLEN-GOMEZ,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

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PROOF OF SERVICE

42729-00001

Elfego vs. City of Burbank – Court of Appeal No. B227414
Appeal from *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On September 2, 2011, I served a copy of the foregoing document(s) described as: **RESPONDENT'S BRIEF** on the interested parties in this action at their last known address as set forth below by taking the action described below:

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Elfego vs. City of Burbank – Court of Appeal No. B227414
Appeal from *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On September 2, 2011, I served a copy of the foregoing document(s) described as:

1. **RESPONDENT'S BRIEF**

2. RESPONDENT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

on the interested parties in this action at their last known address as set forth below by taking the action described below:

Los Angeles Superior Court, Department 37 The Honorable Joanne O'Donnell 111 North Hill St. Los Angeles, CA 90012 Tel: (213) 974-5649
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☒ **BY PERSONAL DELIVERY:** I placed the above-mentioned document(s) in sealed envelope(s), and caused personal delivery by of the document(s) listed above to the person(s) at the address(es) set forth above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 2, 2011 at Los Angeles, California.

Michele Glikman

Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

OMAR RODRIGUEZ, STEVE KARAGIOSIAN
AND CINDY GUILLEN-GOMEZ,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

AMENDED PROOF OF SERVICE FOR SUPERIOR COURT

MITCHELL SILBERBERG & KNUPP LLP
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CITY OF BURBANK, including the
POLICE DEPARTMENT OF THE CITY OF BURBANK
(erroneously sued as an independent entity named
"BURBANK POLICE DEPARTMENT")

PROOF OF SERVICE

42729-00001

Elfego vs. City of Burbank – Court of Appeal No. B227414
Appeal from *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On September 2, 2011, I served a copy of the foregoing document(s) described as:

1. RESPONDENT'S BRIEF

2. RESPONDENT'S APPENDIX IN LIEU OF COURT'S TRANSCRIPT

on the interested parties in this action at their last known address as set forth below by taking the action described below:

Clerk of the Court Los Angeles County Superior Court /Central District 111 North Hill St. Los Angeles, CA 90012

☒ **BY OVERNIGHT MAIL:** I placed the above-mentioned document(s) in sealed envelope(s) designated by the carrier, with delivery fees provided for, and addressed as set forth above, and deposited the above-described document(s) with FedEx in the ordinary course of business, by depositing the document(s) in a facility regularly maintained by the carrier or delivering the document(s) to an authorized driver for the carrier.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 2, 2011, at Los Angeles, California.

Michele Glikman

Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

OMAR RODRIGUEZ, STEVE KARAGIOSIAN
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Defendants and Respondents.

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LASC Case No. BC 414602

PROOFS OF SERVICE BY MESSENGER

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Attorneys for Defendants and Respondents
CITY OF BURBANK, including the
POLICE DEPARTMENT OF THE CITY OF BURBANK
(erroneously sued as an independent entity named
"BURBANK POLICE DEPARTMENT")

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18, and not a party to the within action; my business address is , .
1517 W. Beverly Bl., Los Angele CA 90026
On September 2, 2011, I served the foregoing document(s) described as

1. **RESPONDENT'S BRIEF**

2. RESPONDENT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

which was enclosed in sealed envelopes addressed as follows, and taking the action described below:

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Attorneys for Plaintiffs Omar Rodriguez, Cindy Guillen-Gomez, Steve Karagiosian, Elfego Rodriguez, and Jamal Childs

☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

☐ to the addressee(s);

☒ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

☐ by leaving the envelope in a conspicuous place at the office of the addressee(s) between the hours of 9:00 a.m. and 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 2, 2011, at Los Angeles, California.

ANDY GOUKASIAN
Printed Name

Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18, and not a party to the within action; my business address is , .
1517 W. Beverly Blvd., Los Angeles, CA 90026
On September 2, 2011, I served the foregoing document(s) described as

1. **RESPONDENT'S BRIEF**

2. RESPONDENT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

which was enclosed in sealed envelopes addressed as follows, and taking the action described below:

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☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

☐ to the addressee(s);

☒ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

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Executed on September 2, 2011, at Los Angeles, California.

ARNEL BARTOLOME
Printed Name

Signature